[Cite as *State v. Brown*, 2015-Ohio-2131.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. DEVIN DEMAR BROWN Appellant	C.A. No. 27526 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 97 01 0181

DECISION AND JOURNAL ENTRY

Dated: June 3, 2015

SCHAFER, Judge.

{¶1} Defendant-Appellant, Devin Demar Brown, appeals from the August 21, 2014 journal entry of the Summit County Court of Common Pleas denying his motion for leave to file motion for new trial. For the reasons set forth below, we affirm.

I.

{¶2} On June 10, 1997, a jury convicted Devin Demar Brown of one count of aggravated murder with a firearm specification, one count of felonious assault with a firearm specification, two counts of attempted murder with firearm specifications, felony murder with a firearm specification, and carrying a concealed weapon. The trial judge sentenced Mr. Brown to 53 years to life in prison.

{¶3} Following this Court's 2010 decision, *see State v. Brown*, 9th Dist. Summit No. 25206, 2010-Ohio-4863, the matter was remanded to the trial court for resentencing. The trial court then resentenced Mr. Brown via entry on December 14, 2010 to 47 years to life in prison.

{¶4} On July 5, 2013, Mr. Brown filed a motion for leave to file a motion for new trial based on newly discovered evidence pursuant to Crim.R. 33(B). Mr. Brown's alleged newly discovered evidence consists of affidavits from two State witnesses, Mr. Delvilin Lewis and Mr. Derrick Patton, which were attached to his motion. Mr. Lewis' affidavit was dated April 18, 2013 and Mr. Patton's affidavit was dated April 4, 2013. In their respective affidavits, Mr. Lewis and Mr. Patton both recant their trial testimony against Mr. Brown and attest that police officers and prosecutors coerced them into testifying against Mr. Brown. The trial court denied the motion because Mr. Brown did not demonstrate that he was unavoidably prevented from discovering the new evidence. *See* Crim.R. 33(B).

{¶5} On May 22, 2014, Mr. Brown again filed a motion for leave to file motion for new trial, this time without attaching the two affidavits thereto. Noting that Mr. Brown's motion made the same arguments and relied upon the same affidavits as his prior motion, the trial court denied Mr. Brown's second motion.

{¶6} On July 30, 2014, Mr. Brown filed a third motion for leave to file motion for new trial. The two affidavits were attached to Mr. Brown's third motion, but the affidavits contained new statements from Mr. Lewis and Mr. Patton. The trial court denied Mr. Brown's third motion via journal entry on August 18, 2014.

{¶7} Mr. Brown now appeals from the trial court's August 18, 2014 journal entry denying his motion raising one assignment of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ABUSED IT'S [SIC] DISCRETION TO THE PREJUDICE OF THE DEFENDANT/MOVANT BY DISMISSING HIS MOTION FOR LEAVE TO FILE MOTION FOR NEW TRIAL, WITHOUT FIRST CONDUCTING THE REQUIRED HEARING TO ADDRESS THE

> MERITS OF THE EVIDENCE AND PROBATIVE VALUE OF THE SWORN AFFIDAVIT(S) WHICH ACCOMAPNIED [SIC] THE MOTION FOR LEAVE TO FILE MOTION FOR NEW TRIAL. IN LIGHT OF OHIO.CRIM.RULE 33(A)(6) ET SEQ, & CRIM.RULE, 33(B), ALSO ESTABLISHING "MANIFEST INJUSTICE" OCCURRED.

{¶8} In his sole assignment of error, Mr. Brown argues that the trial court abused its discretion by denying his motion for leave to file motion for new trial without first holding a hearing to consider his alleged newly discovered evidence. We disagree.

{¶9} A trial court's decision on whether to hold a hearing on a motion for leave to file a delayed motion for new trial will not be reversed on appeal absent an abuse of discretion. *State v. Davis*, 9th Dist. Lorain No. 12CA010256, 2013–Ohio–846, ¶ 6. Moreover, a trial court's ultimate decision to grant or deny an underlying motion for new trial will also not be reversed on appeal absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 76 (1990); *State v. Jones*, 9th Dist. Summit No. 26568, 2013–Ohio–2986, ¶ 8. An abuse of discretion implies the trial court's decision is arbitrary, capricious, or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶10} Pursuant to Crim.R. 33(A)(6), a new trial may be granted on the motion of the defendant "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." Further, Crim.R. 33(B) states, in relevant part, that if the basis of the motion is newly discovered evidence, the motion:

> shall be filed within one hundred twenty days after the day upon which the verdict was rendered[.] If it is made to appear by *clear and convincing proof* that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the [trial] court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

(Emphasis added.) Clear and convincing proof "'requires more than a mere allegation that a defendant has been unavoidably prevented from discovering the evidence he seeks to introduce

as support for a new trial.'" *State v. Gilcreast*, 9th Dist. No. Summit 26311, 2013–Ohio–249, ¶ 4, quoting *State v. Covender*, 9th Dist. Lorain No. 07CA009228, 2008–Ohio–1453, ¶ 6, quoting *State v. Mathis*, 134 Ohio App.3d 77, 79 (1st Dist.1999), overruled on other grounds, *State v. Condon*, 157 Ohio App.3d 26, 2004-Ohio-2031 (1st Dist.). Clear and convincing proof is that "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶11} "Crim.R. 33(B) calls for an initial determination that there was unavoidable delay." *State v. Gilliam*, 9th Dist. Lorain No. 14CA010558, 2014-Ohio-5476, ¶ 11, quoting *State v. Holmes*, 9th Dist. Lorain No. 05CA008711, 2006-Ohio-1310, ¶ 11. "Although a defendant may file his motion for a new trial along with his request for leave to file such motion, the trial court may not consider the merits of the motion for a new trial until it makes a finding of unavoidable delay." *Id*., quoting *Covender* at ¶ 13. " 'Unavoidable delay results when the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence.' " *Covender* at ¶ 14, quoting *State v. Rodriguez–Baron*, 7th Dist. Mahoning No. 12–MA–44, 2012-Ohio-5360, ¶ 11.

{¶12} Here, Mr. Brown began filing his motions over 16 years after his convictions, far beyond the 120-day deadline for the submission of newly discovered evidence. Crim.R. 33(B). Therefore, Mr. Brown was required to show, by clear and convincing proof, that he was unavoidably prevented from discovering the evidence on which he relied within 120 days of his conviction. *Id*. We conclude that Mr. Brown fails to make such a showing.

{¶13} Mr. Brown bases his motion for leave to file motion for new trial on two affidavits, wherein Mr. Lewis and Mr. Patton both respectively recant their trial testimony against Mr. Brown and assert that prosecutors and law enforcement coerced them into blaming Mr. Brown for the serious crimes for which he was accused. However, both affidavits make nothing more than vague and general statements. Neither witness's affidavit provided support for his contention that he testified against Mr. Brown under duress, nor did the two witnesses provide any specifics regarding the individuals who allegedly pressured them into falsely testifying. While both men attest that they finally decided to "come clean" in the spring of 2013 about falsely testifying against Mr. Brown, neither affiant stated any reason as to why it took over 16 years for them to recant their respective testimony. Moreover, Mr. Brown has failed to demonstrate how he acquired Mr. Lewis and Mr. Patton's affidavits or how he was unavoidably prevented from obtaining the affidavits within 120 days of his conviction.

{¶14} Accordingly, we conclude that the trial court did not err in denying Mr. Brown's motion for leave to file motion for a new trial. Because we determine that the trial court did not abuse its discretion in finding that Mr. Brown was not unavoidably prevented from discovering this evidence, we decline to address the merits of Mr. Brown's motion.

{¶15} Mr. Brown's sole assignment of error is overruled.

III.

{¶16} Mr. Brown's sole assignment of error is overruled, and the August 18, 2014 journal entry of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JULIE A. SCHAFER
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

DEVIN DEMAR BROWN, pro so, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.